Nos. 77-592, 77-5448 and 77-5456

In the Supreme Court of the United States

OCTOBER TERM, 1977

JULIAN E. SEYMOUR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

LONNIE M. BROWN and JAMES B. FINNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT L. NEWSOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a)[1] is reported at 555 F. 2d 407.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-592.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1977. A petition for rehearing was denied on August 24, 1977 (Pet. App. 56a). A petition for a writ of certiorari was filed in No. 77-5448 on September 21, 1977; in No. 77-5456 on September 22, 1977; and in No. 77-592 on October 21, 1977, pursuant to an extension of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the reversal of the petitioners' convictions on the conspiracy counts in the court of appeals requires that they be granted new trials on the substantive racketeering count and be tried separately.

2. Whether showing the existence of a "pattern of racketeering activity" by evidence that included proof of acts committed prior to the effective date of the Organized Crime Control Act of 1970 violated the Ex Post Facto Clause or the statute of limitations.

3. Whether the Macon, Georgia, police department can be an "enterprise" within the meaning of 18 U.S.C. 1961(4).

4. Whether petitioners were prejudiced by the district court's *ex parte* investigation and removal of a juror.

5. Whether the district court improperly restricted petitioners' access to government witnesses by requiring that requests for interviews of the witnesses be relayed through a clerk of the court, that the clerk be present during such interviews, and that the interviews be recorded.

6. Whether petitioners were engaged in the kind of "racketeering activity" that falls within the prohibition of 18 U.S.C. 1962(c).

7. Whether the reference to state law in 18 U.S.C. 1961(1), which defines "racketeering activity," requires that the Georgia state court rule requiring corroboration of accomplice testimony be applied in a federal prosecution for engaging in racketeering activity in violation of 18 U.S.C. 1962(c).

8. Whether the court of appeals improperly failed to consider all the issues raised by petitioner Seymour on appeal.

9. Whether the Solicitor General, who was a member of the panel of the court of appeals that heard this case, improperly participated in the government's decision not to petition for rehearing *en banc* in the court of appeals on the issues that were decided favorably to petitioners.

STATUTES INVOLVED

18 U.S.C. 1511 provides, in relevant part:

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. 1961 provides, in relevant part:

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving * * * bribery * * * which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: * * * section 1511 (relating to the obstruction of State or local law enforcement) * * *.

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. 1962 provides, in relevant part:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or

indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of participating, through a pattern of racketeering activity, in the conduct of the affairs of an enterprise affecting interstate commerce, in violation of 18 U.S.C. 1962(c) (Count I), and conspiring to do so, in violation of 18 U.S.C. 1962(d) (Count II). Petitioners Seymour, Brown, and Finney were also convicted of conspiring to obstruct the enforcement of state laws with the intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511 (Count III). On Counts I and II petitioners Seymour, Brown, Finney, and Newsome received concurrent prison terms of 15, 12, 12, and ten years' imprisonment, respectively. On Count III, petitioners Seymour, Brown, and Finney were ordered to serve five years' probation (Pet. App. 15a n.2). The court of appeals reversed the convictions on the two conspiracy counts (Counts II and III) and affirmed the convictions on the substantive racketeering count (Count I) (Pet. App. 1a-54a).

The evidence adduced at trial showed that petitioners, members of the Macon, Georgia, police department, protected local gambling, illegal whiskey, and prostitution operations for years in exchange for regular payments from the participants in these activities. Witnesses testified that they had paid the petitioners and other members of the Macon police force for protection of their illegal activities as early as the 1950s. Regular payments were

made to the petitioners through the 1960s, at first by moonshine whiskey producers and then later by persons operating prostitution rings and illegal lotteries (Pet. App. 20a-21a).

In the early 1970s petitioners further expanded their protection racket to cover gambling activities at a number of private clubs, whose owners paid petitioners to safeguard their illegal operations. Various types of gambling machines used in the clubs were supplied and serviced by two local music companies, which also made payments to petitioners to ensure uninterrupted business. During this same period pimps, prostitutes, sellers of illegal whiskey, and nightclub owners wishing to serve liquor after closing hours paid one or more of the petitioners in order to forestall police interference (Pet. App. 21a-22a).

Several Macon police officers testified that they had either accepted payoffs, declined to take payments, or observed petitioners receiving money. These officers outlined the policy established by a former chief of detectives, under which officers assigned to other duties were instructed to relay all information concerning vice-related crime to the vice squad, which was headed by petitioner Seymour. Several officers testified that no action was taken on any of the information they supplied concerning illegal activities. Officers who defied this policy were reprimanded and threatened with dismissal by the chief of detectives or petitioner Seymour. This multi-faceted protection racket, coordinated by members of the vice squad, continued unabated until the federal grand jury investigation that led to the indictment in this case (Pet. App. 22a-23a).

In a lengthy opinion, the Fifth Circuit panel[2] reversed petitioners' convictions on the conspiracy counts, on the ground that the court's instructions improperly permitted the jury to convict for acts committed before the effective date of the Organized Crime Control Act of 1970. The court upheld the convictions on the substantive racketeering count, however, because as to that count the jury was properly permitted to consider evidence predating the statute. That evidence was admissible, the court held, to show the existence of a "pattern of racketeering activity," which is an element of the substantive offense. In addition, the jury was properly instructed that to convict it had to find that each defendant was involved in at least one act of racketeering after the statute took effect. The court of appeals also rejected a number of claims of trial error, many of which petitioners have renewed here.

ARGUMENT

1. Petitioners Brown and Finney first argue (Pet. No. 77-5448, pp. 9-11) that because of the reversal of their convictions on the conspiracy counts, their convictions on the substantive counts must also be reversed. They contend (*id.* at 20-22) that they were prejudiced by the introduction of evidence relating to the activities of their alleged co-conspirators and by out-of-court statements of those co-conspirators, introduced into evidence as vicarious admissions. As the court of appeals pointed out, however, the evidence concerning the activities of the alleged co-conspirators was independently admissible under Count 1 to show the "pattern of racketeering

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[2]Judge Wade H. McCree, Jr., sitting by designation, heard argument in the case but did not participate in the decision, since at the time the case was decided he had been appointed Solicitor General of the United States.

activity" that is an element of the offense under 18 U.S.C. 1962(c) (Pet. App. 28a-29a, 47a n. 42). As to the co-conspirators' admissions, petitioners have failed to point to any particular statements that would have been inadmissible against any of them in separate trials. In fact, the court of appeals carefully examined each out-of-court statement introduced in support of the substantive charge and concluded that each would have been admissible independent of the co-conspirator exception to the hearsay rule (Pet. App. 47a n. 42).

Aside from the erroneous assertion that co-conspirators' statements and other evidence would have been inadmissible in separate trials, petitioners have failed to point to any specific prejudice stemming from their being tried together. Each petitioner was represented by his own counsel; the testimony clearly established the involvement of each petitioner in the racketeering activities;[3] there were only five defendants at trial; and the court carefully cautioned the jury to consider the evidence against each defendant separately.

Finally, petitioners' suggestion that the reversal of their conspiracy convictions automatically makes their initial joinder improper is flatly erroneous. It is well settled that the presence of conspiracy counts renders joinder appropriate under Fed. R. Crim. P. 8, and that the subsequent removal of the conspiracy charges—by dismissal or reversal—does not mandate a severance

[3]Petitioner Newsome's assertion (Pet. No. 77-5456, pp. 26-28) that he should have been granted a severance because of his minimal involvement in the illegal activities is frivolous. He was charged with and convicted for participating in four separate bribery schemes extending from 1966 to 1974 (Pet. App. 17a-18a n. 4). In light of his extensive involvement in the racketeering scheme, the district court acted well within its discretion under Fed. R. Crim. P. 14 in denying him a separate trial.

under Fed. R. Crim. P. 14. See *Schaffer* v. *United States*, 362 U.S. 511; *Peterson* v. *United States*, 405 F. 2d 102, 106 (C.A. 8), certiorari denied, 395 U.S. 938.

2. Petitioners further contend (Pet. No. 77-5448, pp. 15-16; Pet. No. 77-5456, p. 12) that the admission of evidence of acts prior to October 15, 1970, the effective date of Section 1962, to prove that petitioners were engaged in racketeering activity violated the Ex Post Facto Clause of the Constitution. The definitional section of the statute provides that a "pattern of racketeering activity" exists if at least two acts of racketeering take place within ten years of each other, with at least one of these acts occurring after the effective date of the statute. 18 U.S.C. 1961(5). The gravamen of the offense is engaging in racketeering activity after the effective date of the statute, having engaged in similar conduct within the previous ten years. The fact that the prior similar conduct may not have given rise to direct criminal liability under this statute at the time is irrelevant; a defendant is simply given notice by Section 1962 that he may not engage in certain racketeering activity if he has engaged in a pattern of such activity in the recent past. In *United States* v. *Campanale*, 518 F. 2d 352 (C.A. 9), certiorari denied *sub nom. Matthews* v. *United States*, 423 U.S. 1050, where an identical *ex post facto* claim was rejected, the court of appeals properly held that the requirement of an illegal act committed after the statute's effective date saves the statute from running afoul of the Ex Post Facto Clause.

Petitioners also assert (Pet. No. 77-5448, pp. 15-16; Pet. No. 77-5456, pp. 13-14) that proof of any acts occurring more than five years prior to the return of the indictment was barred by the five-year federal statute of limitations (18 U.S.C. 3283). This claim is without merit. In the case of continuing offenses, the statute of limitations begins to

run when the crime is completed. *Pendergast* v. *United States*, 317 U.S. 412, 418. The crime for which petitioners were charged was completed only at the time of the last act of racketeering in the alleged pattern of racketeering activities. Since the indictment in this case was returned in March 1975, and since the jury necessarily found that at least one act of racketeering occurred after October 15, 1970, the effective date of the statute, the jury plainly concluded that the petitioners' illegal conduct fell within the five-year limitations period.

3. Petitioners' next contention (Pet. No. 77-592, pp. 2-5; Pet. No. 77-5448, p. 17; Pet. No. 77-5456, pp. 14-17) is that the Macon police department is not an "enterprise" within the meaning of 18 U.S.C. 1961(4). The statute defines the term "enterprise" to include "any individual, partnership, corporation, association, *or other legal entity*, and any union or *group of individuals associated in fact although not a legal entity*" (emphasis added). Petitioners argue that a governmental entity cannot be an "enterprise" within the meaning of the statute, and that a split exists in the circuits on this issue.

In fact, there is no such split in the circuits. The only other court of appeals to have addressed this issue is the Third Circuit, which reached the same conclusion as the Fifth Circuit in this case. That court, in *United States* v. *Frumento*, 563 F. 2d 1083, 1089-1092 (C.A. 3), petition for certiorari filed October 21, 1977 (No. 77-5617), held that the Pennsylvania Bureau of Cigarette and Beverage Taxes was an "enterprise" within the meaning of 18 U.S.C. 1961(4), based on analysis of both the plain language of the statute and its legislative history. The only case even remotely supporting the petitioners' position is the decision of the district court in *United States* v. *Mandel*, 415 F. Supp. 997, 1021-1022 (D. Md.), where the court held that the State of Maryland was not an

"enterprise" within the meaning of 18 U.S.C. 1961(4). The court in that case ruled that without more explicit statutory authorization, it was not prepared to hold that Congress intended to apply the Organized Crime Control Act of 1970 to the acts of a state governor in "conducting the government of a state." 415 F. Supp. at 1021.

Even if a state is not an "enterprise," that does not mean that the definition of "enterprise" must be restricted solely to private organizations. The language of Section 1961(4) is plainly broad enough to encompass public as well as private entities. Indeed, the statute reaches not only any "legal entity" but even "group[s] of individuals associated in fact," even though their association has no legal status at all. The courts have applied the definition broadly to comport with the underlying purposes of the Organized Crime Control Act: to rid the American economy of the influence of racketeering activity. See *United States* v. *Morris*, 532 F. 2d 436, 442 (C.A. 5) (group of three individuals running a rigged card game is an "enterprise"); *United States* v. *Parness*, 503 F. 2d 430 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Cappetto*, 502 F. 2d 1351 (C.A. 7), certiorari denied, 420 U.S. 925. Construing Section 1961(4) to include public entities such as the Macon police force is plainly consistent with the congressional intent "to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce." 116 Cong. Rec. 585 (1970) (remarks of Senator McClellan).

4. In the course of the trial, the district judge investigated certain misconduct by one of the jurors, which led to that juror's removal. Petitioners argue (Pet. No. 77-5448, pp. 18-19; Pet. No. 77-5456, pp. 23-26) that they should have been consulted prior to the court's investigation into the juror's misconduct.

Initially, the court called counsel for the government and for the defense to chambers and discussed the possible removal of a juror due to illness (Tr. 1290). This conference took place on a Friday; on Monday morning the court advised counsel that the juror had been removed (Tr. 1347). It was during the Monday conference that the court first informed counsel that the juror was removed not merely because she was ill, but for the additional reason that she had stolen several coffee cups from a restaurant where the jurors had dined. The court explained that after the marshal's office received a complaint from the restaurant manager concerning the missing cups, the court ordered the chief deputy marshal to question any deputies who had knowledge of the theft. They reported that the juror who had been ill was the thief. The court also learned that the same juror had been enteraining a married male juror in her room. The judge advised counsel that because of her illness and these acts of misconduct the juror would be removed. The court then conducted a lengthy discussion with counsel concerning ways to minimize the prejudice to the remaining jurors (Tr. 1354-1371). The deputy marshal who retrieved the stolen coffee cups was questioned, but counsel declined to interview any of the jurors who were involved in the incident. Petitioners did not request a further hearing or move for removal of any of the other jurors.

The trial judge's action in excusing the juror did not in any way constitute an abuse of his responsibility to supervise the conduct of the trial. The case of *Remmer* v. *United States*, 347 U.S. 227, upon which petitioners primarily rely, is not to the contrary. In *Remmer*, the foreman of the jury reported to the judge that he had been approached by an individual who had told him that he could profit by bringing in a verdict favorable to the defendant. The judge then informed the prosecution of

the incident and ordered an FBI investigation of the matter, which included questioning the juror and the person who had approached him. Defense counsel was not informed of the investigation until after the verdict, when a newspaper article revealed the information. On the Solicitor General's confession of error, this Court vacated the judgment and remanded for a hearing to determine whether the contact with the juror had prejudiced the defendant.

The Court's concern in *Remmer* was that "[t]he sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly." 347 U.S. at 229. In this case, however, the court's investigation was limited to questioning the deputy marshals who had knowledge of the juror's misconduct, and, unlike the situation in *Remmer*, here the juror was removed and did not participate in the verdict against petitioners.[4] After being satisfied, on the basis of that limited investigation, that the juror was unfit to continue in jury service, the judge simply exercised his well-recognized discretion under Fed. R. Crim. 24(c) to discharge the juror and substitute an alternate.

5. Petitioners argue (Pet. No. 77-5448, pp. 23-27; Pet. No. 77-5456, pp. 18-23) that the district court improperly restricted their right to interview government witnesses by requiring them to relay their requests for interviews through the clerk of the court and by requiring that the clerk be present during the interview and record the interview sessions.

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[4]Because the court's investigation was limited to questioning the deputy marshals in charge of the jury, this case does not raise any issue of the propriety of a private, *ex parte* communication between the jurors and the judge. See *Rogers* v. *United States*, 422 U.S. 35.

Early in the trial the court received a report that a government witness had been interviewed by an attorney for one of the defendants and that the witness might have felt intimidated (Tr. 140-141). This incident, coupled with the court's recognition of the problems inherent in a case involving testimony of witnesses with criminal records, prompted the court to fashion a procedure for the protection of both the government and the defendants (Tr. 141). No defense counsel objected when the procedure was proposed or implemented. In fact, defense counsel participated in the formulation of this procedure and even intimated that their access to government witnesses might be enhanced by the procedure (Tr. 144-147). Moreover, as the court of appeals pointed out (Pet. App. 51a), the court informed counsel that the proposed interview procedure was only an experiment and was subject to revision on request, if defense counsel found the procedure unmanageable. Petitioners, however, failed to raise any subsequent objections to the procedure or to make any specific suggestions for revision. In light of their apparent acquiescence in the court's experimental procedure, petitioners cannot now reasonably claim that the procedures denied them a fair trial.

In any event, the court acted well within its discretion in ordering the clerk to take part in the interview procedure. There had been some indication of intimidation of witnesses by defense counsel, and a number of the government witnesses had expressed fear of the petitioners. It is perfectly permissible for a government functionary, particulary a presumably neutral court official, to inform witnesses of their right to agree or decline to be interviewed. See *United States* v. *White*, 454 F. 2d 435 (C.A. 7), certiorari denied, 406 U.S. 962; *United States* v. *Mirenda*, 443 F. 2d 1351 (C.A. 9), certiorari denied *sub nom. Verdugo-Medina* v. *United States*, 404

U.S. 966. Moreover, in order to avoid having trial counsel take the stand to impeach a witness with statements he made during an interview, it is proper for the court to require a third person to be present during interviews between trial counsel and witnesses. *United States* v. *Porter*, 429 F. 2d 203 (C.A.D.C.); *United States* v. *Vereen*, 429 F. 2d 713 (C.A. D.C.). See also, *Gregory* v. *United States*, 369 F. 2d 185 (C.A.D.C.), certiorari denied, 396 U.S. 865; and Section 4.3(d), American Bar Association, *Standards Relating to the Defense Function* (Approved Draft 1971). The district court explicitly recognized this problem (Tr. 143), and its solution was well within its discretion to provide for proper trial management.

6. Petitioner Newsome next contends (Pet. No. 77-5456, pp. 5-11) that this Court's decision in *Iannelli* v. *United States*, 420 U.S. 770, requires reversal of his conviction for engaging in racketeering activity because Congress did not intend to authorize prosecutions for "small-scale activities" under 18 U.S.C. 1962(c). In light of the evidence showing a massive pattern of corruption extending throughout the vice squad and lasting for almost 20 years, it strains credulity for any of the petitioners to characterize their activities as "small scale." In any event, in relying on the *Iannelli* case petitioner overlooks a critical difference between 18 U.S.C. 1955, the statute involved in *Iannelli*, and 18 U.S.C. 1962(c). While discussing the reasons for the requirement in 18 U.S.C. 1955 that five persons must be involved in the proscribed activity, the Court in *Iannelli* observed that Congress intended to reach only gambling operations of major proportions and meant to leave small-scale gambling activities to local regulation. No such minimum size provisions were incorporated in 18 U.S.C. 1962(c). Instead, Congress focused on the presence of a pattern of illegal acts of certain classes, into which the acts charged

in this case fall comfortably. Accordingly, petitioner's reliance on *Iannelli* is misplaced.

7. Petitioner Newsome further asserts (Pet. No. 77-5456, pp. 17-18) that because state-law violations formed the basis for his conviction under 18 U.S.C. 1962(c), the jury should have been instructed under the Georgia state court rule requiring corroboration of accomplice testimony. It is well established, however, that where federal criminal statutes refer to state law to define illegal conduct, the mere reference to state law for definitional purposes does not require that state evidentiary rules be applied in the federal trial. See *United States* v. *Peskin*, 527 F. 2d 71 (C.A. 7), certiorari denied, 429 U.S. 818; *United States* v. *Revel*, 493 F. 2d 1 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Sacco*, 491 F. 2d 995 (C.A. 9); *United States* v. *Corallo*, 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958.

8. Petitioner Seymour asserts, without argument (Pet. No. 77-592, pp. 5-6), that the court of appeals failed to consider and decide issues six through twelve in his brief on appeal. On the contrary, the opinion of the court of appeals reveals that the court considered each of these issues but found them unworthy of extended discussion.[5]

9. Finally, petitioner Seymour claims (Pet. No. 77-592, pp. 3-4) that Solicitor General McCree, who was a

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[5]Issues number six, seven, eight, nine and eleven relate to the management of the trial by the district judge. The court of appeals found these issues to be "largely without merit" (Pet. App. 50a). Issue number twelve related to the trial judge's instructions and was disposed of by the court's statement that "[t]he other challenges to the court's instructions on Count I are without merit" (Pet. App. 32a). Issue number ten related to the applicability of Georgia law, and the court found that reliance on state law was misplaced (Pet. App. 32a n. 22).

member of the panel that heard the appeal but who did not take part in the decision, improperly participated in the government's determination not to seek rehearing. While it is difficult in any event to divine how the government's decision not to seek rehearing on the issues decided favorably to petitioners could conceivably have injured petitioner Seymour, he is incorrect in his assertion that Solicitor General McCree participated in that decision. In fact, Department of Justice records reveal that it was Deputy Solicitor General Lawrence G. Wallace, serving as Acting Solicitor General for this case, who determined that rehearing should not be sought. Accordingly, even if the Solicitor General's participation would have constituted a conflict of interest that could in any way have injured petitioner Seymour, no such participation occurred here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.